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Sutherland, George

Superfluous government

[Cleveland]

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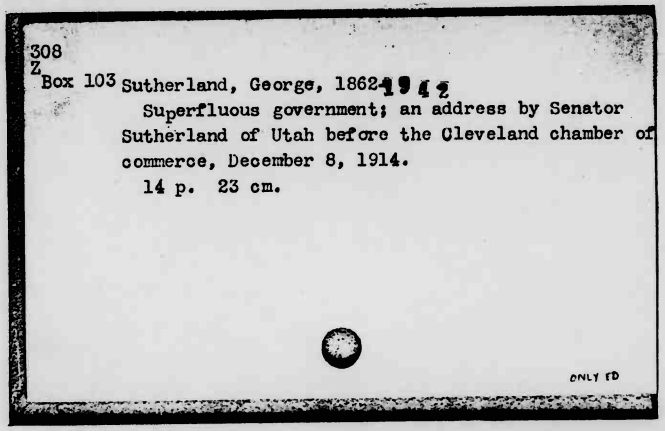

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Superfluous Government

AN ADDRESS

BY

SENATOR SUTHERLAND
of Utah

BEFORE
THE CLEVELAND CHAMBER OF COMMERCE
DECEMBER 8, 1914

SUPERFLUOUS GOVERNMENT

AN ADDRESS DELIVERED BEFORE THE CHAMBER OF COMMERCE, CLEVELAND, OHIO, DECEMBER 8, 1914, BY HONORABLE GEORGE SUTHERLAND, UNITED STATES SENATOR FROM UTAH

Mr. President and Members of the Cleveland Chamber of Commerce:

The last century has witnessed some stupendous changes in our economic, political, social and industrial life, but none more remarkable than the change of opinion which has taken place respecting the proper functions of government. The political philosophy of Thomas Jefferson had for its basic principle the maxim, "That government is best which governs least." The pendulum in recent years has swung so high in the opposite direction that the controlling political maxim of the future bids fair to be, "That government is best which governs most." But the government which governs least is that of the savage tribe, and the government which governs most is a despotism. Obviously, therefore, that government is best which governs neither least nor most but just enough, and while this rule as a guide to action is of no great practical value, since it furnishes no intelligible standard as to what constitutes exactly enough government, it has the advantage of commanding everybody's general assent, albeit no two men would ever be able to agree as to its application in practical detail. Too little government and too much government lie at the opposite extremities of political management but both are bad, for if too little government tends toward anarchy, too much government carries us in the direction of tyranny and oppression and, in the language of Wendell Philips, "kills the self-help and energy of the governed."

CB Oversize 28, 1923 Re.

In the United States there are forty-eight state legislatures at work much of the time, and one national legislature most of the time, passing laws upon all sorts of subjects. I think I am not far wrong in saying that 25% of this legislation is wholly bad, 25% of it has no real excuse for existence, another 25% of it is of doubtful wisdom, leaving barely 25% whose wisdom, necessity and usefulness are fairly beyond dispute. Organized society, however, has wonderful powers of adaptability and manages to get ahead in spite of this constantly growing load of legislation, but only after a vast waste of human energy, a deal of useless expense and much inexcusable annoyance to many people who are perfectly law-abiding and well disposed toward the government and their fellow citizens. And, as though this superfluity of legislation were not burdensome enough, there are several states of the Union busily engaged in supplementing the excessive output by direct popular legislation under the initiative and referendum.

Legislation is attempting everything, from fixing the length of the sheets which a landlord may put upon his beds to enacting a set of more or less detailed plans and specifications of the kind of people who may enter the holy bonds of matrimony. In one state the moderate prescription of a seven-foot sheet satisfies the legislative measure of comfort, while in another nothing less than a nine-foot sheet will save the landlord from the brand of malfeasance. There is a wide diversity of opinion on the subject of eugenics. In Wisconsin scarcely anybody is good enough to be married, while in Illinois such a condition of careless indifference prevails that ability to pay for the marriage license constitutes about the only matrimonial qualification. We are creating an army of official agents, government bureaus and all sorts of commissions to pry into our private affairs, smell out our shortcomings and tell us what we may and what we may not do. In the meantime the cost of living goes steadily up, governmental expenditures increase, taxes

grow heavier year by year, the number of persons whom our forty-nine governments employ is constantly augmented until we are beginning to face the possibility that the government will soon be supporting so many that nobody will be left to support the government.

In state and nation, too many laws are being passed in haste, too many that simply reflect a temporary prejudice, a passing fad, a fleeting whim, a superficial view, or an exaggerated estimate of the extent or a mistaken impression of the quality of an evil. The result is an increasing accumulation of statutes that are neither feared nor respected, and no law should be passed which does not inspire both sentiments—fear for its swift and certain enforcement and respect for its manifest wisdom and justice.

I am not quite sure that I would favor the proposition that every lawmaker should perform his duties with a rope around his neck, which I think was an ancient suggestion, but it might be a wholesome regulation if every legislator who voted for a law that experience demonstrated to be unwise or unworkable or unnecessary should be incarcerated for a reasonable length of time in the county jail. Certainly no jail could be utilized to better advantage.

If only everybody, under all circumstances, were wise enough to know, and virtuous enough to do, what was right, there would be no need of lawmakers or judges at all, but many of us are not wise, and some of us who are wise are not virtuous, so that it has never been found expedient to dispense altogether with the directing voice of the one or the compelling hand of the other. Nevertheless, the perfect freedom of the individual, within certain broad limits, to do as he pleases is so vital to the lasting progress of humanity that whoever seeks to interfere with it must assume the burden of demonstrating the necessity. As we grow in intelligence the consequences which follow good or bad conduct more and more control our behavior. Our dealings with one another are not controlled by statute law, which

visits an infraction of its terms by *punishment* more or less uncertain, more or less delayed and more or less severe, so much as they are by the unwritten moral law, a violation of which automatically imposes certain definite unpleasant *consequences* upon the violator which, like the consequences following the violation of a physical law,—as, for example, an attack of indigestion after an indiscreet dinner,—promote repentance and reformation more surely than a statutory penalty.

The right of individual freedom of action is so sacred and so valuable that the lawmaker who contemplates any abridgment of it is confronted with the delicate problem of determining whether more harm will come from forbidding or limiting the conduct under specific penalties than will result from leaving the objectionable conduct to be regulated by the individual himself under the pressure of public opinion and the menace of the consequences which will follow a lack of self-restraint. In other words, there are two evils to be balanced against one another: namely, the evil of the objectionable conduct and the evil of curtailing individual freedom of action, and it must be determined in advance whether the harm resulting from the objectionable conduct is of so grave a nature as to justify its suppression by a resort to the opposing evil of interference with the freedom of the individual.

As our population increases, as our occupations become more and more numerous and diversified, as our relations with one another grow in complexity, the wise solution of this problem loses none of its emphasis while it constantly grows in difficulty. Everybody agrees, for example, that the use of opium and similar narcotics is so great an evil that society is justified in altogether depriving the individual of his freedom of choice to use or refrain from using them. When we come to the subject of intoxicating liquors, the solution of the problem is not so clear and there is a division of sentiment, some insisting that the use of such liquors is

so harmful that society is justified in depriving the individual of his right of choice, while others insist that the matter should be left to each individual to be solved by his own judgment and controlled by his own powers of self-restraint. When we come to tobacco and like substances a very large proportion of our people agree as to their harmfulness, but nobody seriously suggests that the freedom of the adult individual to do as he pleases with respect to their use should be restricted by law. It is apparent, therefore, that there is no line of sharp precision between the cases where individual liberty of action should be left entirely free and where it should be restricted by legislative enactment; and this is true not only with respect to our habits and vices, but with respect to the whole range of our social and business activities.

Generally speaking, I think individual conduct should be left to be regulated and governed by moral restraint rather than by statutory enactment, unless it can be clearly shown that interference by legislative enactment is necessary for the preservation of the rights of others or for the protection of society as a whole. Statutory regulation of social and business relations can be only measurably successful, since the statute must be of necessity comparatively rigid, inelastic and partial, while the conditions with which it deals are of great variety, of differing degrees of importance and in a constant state of flux.

It is coming to be more and more definitely understood that the physical body has the power, to a wonderful degree, of producing within itself its own curative agents, which in most cases of sickness will effect a cure without the aid of drugs. A somewhat similar condition exists with reference to society as a whole. There seems to be always at work a mysterious, sometimes inarticulate, but always compelling, sort of community conscience which makes for righteous inter-relations, enforced by public opinion often far better and far more permanently than by the arbitrary,

rigid rules of legislation. There is much less drunkenness in the world today than ever before because more individuals have discovered that drunkenness is a vice for which they must automatically pay the penalty in the loss of physical, mental and moral health and in a lowered social status among their fellows.

I have a friend who is a doctor of the homeopathic school. He tells me that sometimes a patient comes to him after having been in the hands of the allopaths. This patient may be suffering not only from disease of some sort, but also from the effects of too much medicine, and the problem which is presented is to determine how much of the trouble is due to the disease and how much to the remedy. I do not know whether my medical friend is right or wrong. I hold no brief for either school of medicine. There is, however, an analagous condition in the social organism, the increasing complexity of which is constantly introducing new evils to be overcome. The remedy usually suggested is an allopathic dose of legislation. The general opinion is that if we only have a law, and particularly a severe law, on the subject everything will be all right. We do not give ourselves time to study the conditions sufficiently to determine whether the symptoms indicate a serious disease or simply mark an irregularity in an otherwise normal and healthful development which will correct itself if left alone; but the demand at once and imperiously goes forth from the doctors of reform for the enactment of a legislative panacea, perhaps to be administered and sometimes amplified, where the terms of it are a little vague, by a bureau or commission. The law is passed and the commission or bureau is set to work, but society still continues to develop and exhibit disagreeable symptoms, and then we are puzzled to determine how much of the trouble is due to the original disease and how much to the remedy.

In a progressive society, laws and methods of government will from time to time require readjustment; but

in the social world, as in the physical world, there are few cataclysms. Changes come sometimes gradually, sometimes swiftly, but, whether slowly or swiftly, as a general thing they come step by step. The face and form of society, like the face and form of nature, change by degrees, which, however closely they may follow one another, are imperceptible from moment to moment. Occasionally these changes do not excite our attention until their cumulative effect has become so great that the necessity of radical alteration in our laws or methods of government becomes suddenly apparent. When a radical change is necessary it should, of course, be made unhesitatingly, however sore for a time the wrench may leave the body politic, but, generally speaking, changes in law or government should be made not spasmodically but deliberately, after patient and thorough consideration, and only in response to clearly changed or changing conditions.

I am profoundly distrustful of the political crusader who is perpetually at fever heat—whose intellectual operations are always in the superlative degree—whose demands are to uproot the tree rather than to spray the infected leaves or lop off the diseased branches—who, if he had control of the matter, would permanently substitute the violence of the earthquake and the fury of the tornado for the methodical processes of nature whereby the happy valleys and smiling plains are formed and made fruitful for the benefit of mankind. For some years now we have had a number of these impatient individuals going up and down the land hoping for the worst and inculcating the gospel of pessimism that "whatever is, is wrong." A good many people have been losing their sense of perspective so that the great good that was being done in the world seemed little and insignificant because it was thrust into the background, and the evil seemed very big and ominous because it was persistently brought into the foreground of every picture, just as the superficial eye is filled by the nearby tangle of weeds more completely

than by the noble upland of field and forest upon the far off horizon. But there are signs, still faint perhaps, but unmistakable, that the people are getting tired of all this professional fury and fustian which has kept the country in turmoil for the last decade. I hope I shall not be charged with injecting a partisan suggestion into a non-political speech if I call attention to the fact that some of these signs were apparent in the recent election. It has been understood quite generally, I think, that the chief political experiment station of the progressive propaganda was located in Wisconsin, but at the election last month the voters of that state rejected all of the so-called progressive amendments to the state Constitution which had been submitted, including those proposing the initiative and referendum, the recall of elective officers and an easier way of amending the Constitution itself, the adverse majorities ranging from sixty-two to one hundred and seven thousand.

The somewhat prevalent notion that, with the possible exception of the well-to-do farmer, only the very poor are honest seems in a fair way to be relegated to the limbo of discredited superstitions. The popular consciousness is growing more hospitable to the thought that dishonesty in business, like dishonesty generally, is the exception and not the rule. If this were not so all the statutes that the wit of man could devise and the diligence of lawmaker could enact would not save us from perdition for a single year. There is a larger realization that business and social morality in the main and in the long run thrive and grow in response to public sentiment far more than in response to statutory compulsion. The law now lacks little of being entirely adequate to deal with exceptional dishonest or oppressive trade practices. The Sherman Law takes care of unlawful trade combinations. Unfair competition is an offense well known to the courts, and the remedy which they furnish is both adequate and speedy. We need no supplemental legislation beyond some provisions defining

and specifically penalizing a few objectionable practices. But, notwithstanding this, Congress has recently passed a law which proceeds upon the theory that all business is justly under suspicion and the basic principle of which seems to be that it is better that a hundred honest business men should be harried and spied upon and regulated and put to expense and annoyance than that one dishonest tradesman should be overlooked. This is the so-called Trade Commission Bill, which is the outgrowth of the dispute which has been carried on for the last twenty years between the redheaded Devil of monopoly and the blackheaded Devil of unrestricted competition.

The Sherman Law was framed upon the theory that competition was the life of trade. Its purpose was to prevent the monopolistic control of interstate commerce. Couched in very general terms, it has required almost a generation for the courts to develop its scope and meaning, but this has now been done. The great combinations have been, or are in process of being, broken up. The broadly comprehensive provisions of the law have come to be thoroughly understood so that business knows its rights and its limitations.

But now come the Clayton Anti-Trust Bill and the Trade Commission Bill, injecting into the problem a multitude of provisions, most of which will require judicial elucidation before anyone can understand what they mean. Take, for example, the provision of the Trade Commission Bill declaring that "unfair methods of competition" are unlawful and giving the Commission power to enforce it. In the first place, the generalization is so vague that no one can determine in advance what methods of competition are unfair. We must wait until the Commission has made up its mind, and inasmuch as the law furnishes no standard, every determination which is made will be in effect a retroactive law as well as a decree. If the Supreme Court does not hold this provision to be void as an attempt to delegate the

lawmaking power of Congress to an administrative board, its execution will result in a period of uncertainty and confusion which, I think, will do more to retard honest business than it will to destroy the occasional malefactor. There is danger, too, that this new trust legislation will tend to neutralize the Sherman law, since the old law put the fear of *combination,* while the new law puts the fear of *competition,* into the hearts of the business men of the country, and business having begun to adjust itself to the limitations upon its right to combine is now confronted with another long and uncertain and embarrassing period of inquiry to ascertain what are to be the limitations upon its right to compete.

Under the Clayton Bill price discrimination and exclusive purchase contracts are forbidden where the effect may be to "substantially lessen competition or tend to create a monopoly in any line of commerce." Whether an act may substantially lessen competition is dependent upon an almost infinite variety of circumstances. When the supply of a given commodity is greatly limited a single act of discrimination may be sufficient; when the supply is abundant and widely distributed, the driving of a score of dealers into bankruptcy by the price discrimination of the wholesaler in favor of rival dealers may not have the effect of substantially lessening competition in that line of commerce.

I cannot at this time undertake any detailed analysis of these bills. I hope they will prove helpful, but my fear is that their effect will be to set the business of the country upon a sea of uncertainty for many years to come.

From the moment that man became a social being the conflict between authority and liberty has been waged without intermission. Too much authority has destroyed liberty and brought despotism, and despotism has brought revolution, and revolution has brought liberty, which, having degenerated into license and anarchy, has in turn brought us back to over-much authority and despotism.

So the political pendulum has swung back and forth between the tyranny of absolutism and the ineffectiveness of unlimited democracies, between the fetters of feudalism and the excesses of French revolutions, and nearly always the trouble has been the tendency of individuals to measure their own rights by the standard of liberty and the rights of others by the standard of authority. There has always been an unconscious bias in favor of regarding liberty as a right to do as *we* please and prevent others from doing as *they* please. Hence, we continually face the danger of class legislation such as was embodied in the Sundry Civil Bill, vetoed by President Taft but approved by President Wilson, which attempted to exempt combinations of farmers and horticulturists and workmen from the penalties of the Sherman Law, while leaving business men and capitalists subject to them.

Of course, we did not need the Clayton Bill to tell us that labor is not a commodity or an article of commerce. No court has ever said it was or held that any combination looking to the betterment of labor conditions, the regulation of hours of work or the increase of wages is *per se* in restraint of commerce. An organization of workmen or an organization of farmers in itself is entirely legal, but so is an organization of business men or of capitalists. It is only when such organization has for its object the restraint of interstate commerce or operates so as to restrain interstate commerce that it becomes amenable to the Sherman Law. That law is perfectly indifferent to organizations for other purposes. The thing interdicted is restraint of trade, and if restraint of trade be an offence when effected by a combination of lumber dealers, surely restraint of trade should be an offence when effected by a combination of farmers, unless we are prepared to incorporate into our political system the new and dangerous doctrine that the character of the *actor*, and not the quality of the *act*, is the test of culpability.

Here in the United States we have been indulging in the hope that we had attained that happy equipoise where authority and liberty exactly counterbalance. Whether that hope is to be justified will, in my judgment, depend very much upon our being wise enough to avoid the dangers which inhere in the attempt to give direction by legislation to modern complex social and business conditions. Let me enumerate some of these dangers:

First, there is the desire to make everybody perfect by legislation, the danger of which lies in its tendency to undermine the strengthening effect of the social and moral forces and bring the individual to depend more and more upon conventional rules as a measure of his rights and responsibilities and less and less upon the self-convincing standards of right and wrong.

Second, the danger that in attempting to control or regulate individual conduct we shall over-emphasize the need of safeguarding the interests of the public and unduly abridge the independent action of the individual, with a consequent loss in the quality and extent of his powers of self-help, self-restraint and self-reliance.

Third, the danger that in our so-called social welfare legislation, the purpose of which has my earnest sympathy and support, we may lose sight of the practical in an excess of sentiment and, in our efforts to aid the weak and unfortunate, we shall encourage the idle and profligate.

Fourth, the growing tendency of government to extend its functions and particularly to invade the field of private activity and business, the dangers of which are many and among them, that so many responsibilities will be assumed that some or all will be discharged inefficiently or that the government itself will break down under the weight and multiplicity of its burdens; that individual enterprise and individual initiative will be injuriously abridged; that the expense of government will be enormously increased without compensating advantage; and that the number of gov-

ernment officials and employees will finally become so vast that they will exert undue influence in our elections and upon our legislation. These are the dangers involved in any scheme of government ownership of railroads or other business enterprises. The office of government is to govern, not to transact business. It cannot invade the domain of private business without narrowing the field of equal opportunity for its citizens. To my mind it is as important to keep government out of business as it is to keep business out of government.

Fifth, the increase of bureaus and commissions, the danger of which is that we shall undermine and weaken the fundamental principle upon which this government rests: namely, that it is a "government of laws and not of men," for as we multiply these administrative bodies and extend their discretionary powers we more and more limit the domain of fixed law as a test of individual rights and obligations and enlarge the domain of personal government, which may easily become partial and autocratic.

Sixth, the tendency to enlarge the powers and responsibilities of the national government at the expense or to the relief of the state governments, the danger of which is that we may overload the national government and correspondingly weaken the vigor and self-helpful qualities of the state governments.

In the framework of our political institutions nothing, in my judgment, is wiser than the dual system of government, under which matters which concern the states as a political union are left to the general government and things which concern the states as political units are left to the state governments. The state government can deal with its local problems, with which it is in close and intimate touch, far more wisely than the government at Washington, from which the problems are remote. Yet there is a constant demand that the Federal government shall deal with subjects over which its authority does not extend,

because the states, or some of them, do not act at all or do not act in the way some people think they should. These demands are sometimes so plausible and so insidious in their promise of benefit to the people of the state, particularly where the expenditure of money from the national treasury is involved, that they meet with enthusiastic support, but nevertheless they are dangerous in their final tendency, for every time the general government undertakes to relieve the state from its financial or other burdens or to invade the functions of the state it contributes toward the ultimate destruction of the state's power and desire to help itself. I am a believer in a strong national government and in the liberal interpretation of its powers, but I am also a believer in a strong state government with its powers jealously guarded from invasion; for I think it is only by maintaining the powers of each and holding each to the full measure of its separate responsibilities that we shall escape the weakness of over-distribution upon the one side and the dangers of over-centralization upon the other.

Of course, in this day of growing social complexity, of increasingly vast undertakings, of expanding development, the statute law cannot remain stationary—alterations and additions from time to time become both wise and necessary. Enlargements in the scope and operations of government are inevitable. Human judgment is fallible, human nature is infinitely varied, and government which depends upon the one and deals with the other can never become an exact science. It will remain to a greater or less extent, as it has always been, a field of experiment, where fact and fancy sow the seed and sweet or bitter experience reaps the harvest of wisdom or of folly which results. I imagine we shall never have a government founded upon perfect wisdom, but if wisdom is to preponderate in the one we now have, it must not be allowed to wander too far from the sphere of its normal and traditional functions or interfere overmuch with the liberty of the individual to work out his destiny here and his salvation hereafter in his own way.

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